



A LAWYER'S PERSPECTIVE
ON
ENVIRONMENTAL REPORTING ETHICS

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State Bar of Texas
The Fourteenth Annual Texas
Environmental Superconference
August 1-2, 2002
Austin, Texas

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I. INTRODUCTION

Friction between the many environmental reporting and disclosure requirements and the Texas Disciplinary Rules of Professional Conduct's confidentiality obligations creates one of the principal ethical tensions for lawyers in environmental practice. By the nature of their professional duties, attorneys (and technical professionals) are privy to highly sensitive information about their clients. The information may deal with compliance with applicable laws, or with the presence or release of contamination at property owned or operated by clients.

Traditionally, a professional relationship has been recognized as creating special responsibilities to the client. One of the hallmarks of that relationship has been the professional's duty of confidentiality. Ethical codes addressing an attorney's confidentiality responsibilities have been in place for some time. However, the explosion of environmental regulation over the past few decades has triggered new debate over the traditional balancing of the duty of confidentiality on the one hand with the need to protect the public health and safety on the other hand.²

By virtue of his recent article entitled *Beware Legal Cover-Ups*, which appeared in the March 2002 issue of EM, the Air & Waste Management Association's magazine for environmental managers, Hal Taback revived debate about consultants' and attorneys' roles upon discovery of releases that may threaten public health.³ In the article, Mr. Taback considers a consultant's ethical obligations to disclose client confidences. He presents a scenario in which a consultant, engaged by legal counsel, discovers during an environmental compliance audit the release of toxic chemicals that the consultant is certain will threaten public health. The lawyer directs the consultant to stop work and not submit his finding in writing, then reminds the consultant of his contract which obligates the consultant to maintain confidentiality. The lawyer informs the consultant that he will handle any reporting and resists providing the consultant

¹ With the permission of West Publishing Company, this paper includes an update to and expansion of a portion of Chapter 32 of 46 TEXAS PRACTICE ENVIRONMENTAL LAW §§ 32.2-32.8 (Jeff Civins et al. eds., 1997), authored by Bonita C. Barksdale, Charles C. Jordan, and John S. Slavich.

² See generally Walker, *Ethical Problems in the Solid and Hazardous Waste Management Practice*, 22 ST. B. TEX. ENV'T'L. L.J. 1-9 (Summer 1991); Dotterrer, *Attorney-Client Confidentiality: The Ethics of Toxic-Dumping Disclosure*, 35 WAYNE L. REV. 1157 (Spring 1989).

³ Hal Taback, *Beware Legal Cover-Ups*, EM (March 2002).

information about how or whether the release will be reported. While the consultant's ethical obligations are beyond the scope of this paper, this paper should provide some insights on the basis for the attorney's actions that may appear to the consultant to be secretive or callous towards the public.

For resolution of ethical dilemmas, the environmental practitioner must consider the primary law of professional responsibility including:

1. The Texas Disciplinary Rules of Professional Conduct ("TDRPCs");⁴
2. The American Bar Association's Model Rules of Professional Conduct ("Model Rules");⁵
3. The Texas Lawyer's Creed;⁶
4. Applicable rules of civil procedure;⁷ and
5. Statutes legislating particular conduct in the face of ethical considerations.⁸

In addition to these codifications, a small but growing body of common law focuses on ethical concerns of the environmental practitioner.

⁴ TEX. DISCIPLINARY R. PROF'L CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (West 1998) (TEX. STATE BAR R. art. X, § 9). Useful secondary sources include Robt. F. Schuwerk and John F. Sutton, Jr., A GUIDE TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT (1990) and Charles F. Herring, Jr., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE (1991).

⁵ MODEL RULES OF PROFESSIONAL CONDUCT (ABA 2002). A useful secondary source is ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA).

⁶ *See* Joint Order dated November 7, 1989, of the Texas Supreme Court and the Court of Criminal Appeals, *reprinted* 52 TEX. B.J. 1302 (1989).

⁷ *See, e.g.*, TEX. R. CIV. P. 13 (bad faith or groundless pleadings); TEX. R. CIV. P. 215 (discovery abuse); FED. R. CIV. P. 11 (pleadings unfounded in fact or law); FED. R. CIV. P. 60 (misconduct as grounds for relief from court order).

⁸ *See, e.g.*, TEX. GOV'T CODE ANN. § 2001.061 (West 2000) (*ex parte* communications in agency proceedings); TEX. GOV'T CODE ANN. § 572.054 (West 1994) (revolving door limitations).

II. DISCLOSURE REQUIREMENTS IMPOSED ON OWNER/OPERATORS

An attorney's ethical disclosure obligations must be considered in the context of the client's disclosure obligations. The owner and operator of a facility permitted for air emissions, wastewater discharge, or waste disposal are commonly subject to record retention and reporting requirements by virtue of permit conditions. Such requirements may be imposed by statute or regulation, as well. In addition to routine reporting of operations-related data, the owner/operator may be required to report extraordinary events. For example, the Texas Natural Resource Conservation Commission, renamed as the Texas Commission on Environmental Quality effective September 1, 2002 ("TCEQ"), mandates immediate reporting of major upset conditions causing excessive contaminant emissions.⁹ The owner/operator suffering an accidental discharge or spill causing pollution must notify the TCEQ immediately, as well.¹⁰ More specifically, tank owners or operators must report confirmed spills and releases from underground storage tanks (and other suspicious tank conditions) to TCEQ immediately.¹¹ Operators at well sites and pipeline facilities must report leakage as well as other potentially harmful circumstances.¹² Criminal sanctions are imposed for the intentional or knowing failure by a person to notify or report to the TCEQ in accordance with a rule, permit or order issued by the appropriate agency.¹³

III. DUTIES OF CONFIDENTIALITY UNDER THE DISCIPLINARY RULES

The TDRPCs define two classes of confidential information learned in the course of representing a client that a lawyer must maintain in confidence, in the absence of cause for discretionary or mandatory disclosure. "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence.¹⁴ "Unprivileged client information" refers to all information relating to a client or

⁹ 30 TEX. ADMIN. CODE § 101.6 (West 2002).

¹⁰ TEX. WATER CODE ANN. § 26.039 (West 2000).

¹¹ 30 TEX. ADMIN. CODE § 334.72 (West 2002).

¹² 16 TEX. ADMIN. CODE § 3.20 (WEST 2002).

¹³ TEX. WATER CODE ANN. § 7.150 (West 2000).

¹⁴ TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a). TDRPC 1.05(a) has not been updated to reflect the combination of the Texas Rules of Evidence and the Texas Rules of Criminal Evidence and continues to include in the definition of "privileged information" that information protected by the lawyer-client privilege under Rule 503 of the Texas Rules of Criminal Evidence. Order, TEX. R. EVID., Court of Criminal Appeals of Texas, Feb. 25, 1998, available at WL 13839. See also, Order, TEX. R. EVID., Supreme Court of Texas, Feb. 25, 1998, available at WL 13838.

furnished by a client (other than privileged information) acquired during the course of or by reason of the representation of a client.¹⁵

A. Disclosures of Confidential Information

1. Permitted Disclosure of Confidential Information

Disclosure of confidential information is allowed, but not required, under several different provisions of the TDRPCs. The TDRPCs, of course, permit such disclosure with the client's express authorization¹⁶ or consent after consultation.¹⁷ Attorneys may also disclose confidential information to the client's representatives and members, associates, and employees of the lawyer's law firm (unless otherwise instructed by the client).¹⁸

The TDRPCs permit disclosure of confidential information by the lawyer "[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, *or other law*."¹⁹ This rule gives leeway for the disclosure of confidential information when counsel determines that governing law requires it. The rule is silent, however, as to whose compliance obligation is addressed -- the client's or the lawyer's. If counsel determines that substantive law imposes a duty of disclosure *on counsel*, then it appears that the TDRPCs will allow the lawyer to disclose confidential information without threat of sanction. However, it is less clear that the provision authorizes the lawyer to disclose confidential information (*e.g.*, the occurrence of a reportable spill) merely because the lawyer determines that *the client* is obligated by law to disclose such information, but fails or refuses to do so.²⁰

Although it provides no clear answers, Comment 14 to TDRPC 1.05 offers some guidance to lawyers contemplating a discretionary disclosure. The comment suggests that a lawyer consider such factors as "the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be

¹⁵ TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(a).

¹⁶ *Id.* at 1.05(c)(1).

¹⁷ *Id.* at 1.05(c)(2).

¹⁸ *Id.* at 1.05(c)(3).

¹⁹ *Id.* at 1.05(c)(4) [emphasis added].

²⁰ See Section III.D. for a discussion of ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-375 (1993) (observing that the duty to disclose takes precedence over the duty to keep client confidences under MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (adjudicative proceeding) or 3.9 (legislative or administrative tribunal)).

injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question."²¹

2. Mandatory Disclosure of Confidential Information

Mandated disclosures of confidences have created substantially more controversy than discretionary ones. The TDRPCs *require* disclosure when a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act likely to result in death or substantial bodily harm to a person.²² TDRPC 1.05 holds special interest for the environmental practitioner. Activities of members of the regulated community may on occasion endanger human health (unlike clients' business activities in many other civil practice fields). There also is frequently a potential for the regulated client to commit crimes without apparent *mens rea*, because the burden of proof of criminal intent is relatively low, or sometimes non-existent.²³ An example is the client who confesses an intention not to report or respond to the spill of a toxic substance, raising the questions whether (a) the conduct would be criminal and (b) the conduct would "likely" result in "substantial bodily harm," given variables such as waste toxicity and degree of human exposure.

A key concern to the practitioner is determining when the duty under TDRPC 1.05 to prevent human endangerment overrides the lawyer's duty to maintain his or her client's confidences. The TDRPCs' requirement that client confidences be disclosed under qualifying circumstances is a rare example of mandated disclosure, focusing attention on the precise scope of this duty. A comparison of the Texas rule with the ABA's analogous Model Rule 1.6 is instructive. There are two substantial distinctions: (1) Assuming the predicates of the rule are satisfied, the Texas rule *requires* lawyer disclosure while the Model Rule only permits it; and (2) the Texas rule is triggered only when the conduct is criminal or fraudulent. Although the former Model Rule required *imminence* of health effects, it was amended to be triggered whenever necessary to prevent "reasonably certain death or substantial bodily harm."²⁴ The omission of the imminence standard from both the Model Rule and the TDRPCs suggests the drafters' intent that a circumstance like the presence of released carcinogens or toxicants which

²¹ TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmt. 14; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 13.

²² TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(e), reading in pertinent part:

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

²³ See, e.g., TEX. WATER CODE ANN. §§ 7.154, 7.155 (West, 2000).

²⁴ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (2002).

are predicted to cause some increased risk of death or illness with exposure over time should trigger the endangerment exception to the presumption of confidentiality. New Comment 6 to the Model Rule makes clear that imminence of the threat is unnecessary and that a lawyer may make a disclosure “if there is a present and substantial threat that a person will suffer [death or substantial bodily] harm at a later date if the lawyer fails to take action necessary to eliminate the threat.”²⁵ The Comments to TDRPC 1.05(e) do not shed much light on the question, but a bias against breaking a confidence was clearly intended. Like the Model Rules, the Comments to the TDRPCs recite emphatically that “the lawyer’s decisions . . . should not constitute grounds for discipline unless the lawyer’s conduct . . . was unreasonable under all existing circumstances.”²⁶

While the substantive law of professional responsibility does not offer much help in assessing the application of TDRPC 1.05(e) in this setting, under the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and federal Sentencing Guidelines, certain conduct, undertaken knowingly, which places another person in “imminent danger of death or serious bodily injury,” subjects the actor to criminal penalties.²⁷ Cases addressing the issue of when a defendant’s conduct results in “knowing endangerment” furnish some guidance, by analogy, in interpreting TDRPC 1.05(e), even if these precedents are concerned with criminal culpability rather than a civil standard for professional discipline. The few reported cases suggest that remote health effects of toxic exposure may be relevant in determining whether such exposure amounts to “endangerment.”²⁸ If TDRPC 1.05(e) were so interpreted, it would raise numerous questions. Unlike murder or assault, threats of toxic exposures are less capable of identification, much less quantification. However, with the omission of any requirement that “substantial bodily harm” immediately follow the client’s act, and mandated disclosure of confidential information related to the client’s criminal concealment, the TDRPCs offer reason to consider carefully the long-term health consequences of a client’s activities where criminal conduct is known or suspected.

²⁵ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 6.

²⁶ TEX. DISCIPLINARY R. PROF’L CONDUCT 1.05 cmt. 20; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 13.

²⁷ The knowing endangerment provisions of these statutes are at 42 U.S.C. § 7413(c)(5)(a), 33 U.S.C. § 1319(c)(3)(a), and 42 U.S.C. § 6928(e), respectively. *See also*, TEX. WATER CODE ANN. Ch. 7, Subch. E (West 2000 and West Supp. 2002). The applicable Sentencing Guideline is guideline § 2Q1.1; *See* U.S. Sentencing Comm., FEDERAL SENTENCING GUIDELINES MANUAL (West 1994).

²⁸ *See United States v. Villegas*, 784 F.Supp. 6. (S.D.N.Y. 1991), *rev’d, remanded sub nom, United States v. Plaza Health Lab.*, 3 F.3d 643 (2d Cir. 1993), *cert. denied*, 512 U.S. 1245 (1994) (Clean Water Act knowing endangerment prosecution stemming from waterfront dumping of specimens of hepatitis B-infected blood samples); *United States v. Protex Indust., Inc.*, 874 F.2d 740 (10th Cir. 1989) (RCRA knowing endangerment prosecution of steel drum reconditioner based on defendant’s failure to provide adequate safety precautions in the workplace). *See also U.S. v. Borowski*, 977 F.2d 27 (1st Cir. 1992).

B. Crime-fraud Exceptions to Confidentiality

The TDRPCs contain two additional provisions mandating disclosure of client confidences.

The first so-called “crime-fraud” exception to an attorney’s obligation to retain client confidences is found in TDRPC 4.01(b), which requires the Texas practitioner to disclose *any* material fact to a third person when disclosure is necessary to avoid making the lawyer *a party* to a criminal or fraudulent act perpetrated by a client.²⁹ Strict compliance is dictated for obvious reasons, including (but by no means limited to) the ethical ramifications.

The other “crime-fraud” exception is in TDRPC #3.03(a), requiring disclosure of confidences to avoid *assisting* a criminal or fraudulent act specifically in the practitioner’s representation of a client before a “tribunal,” where a failure to disclose would be knowing, *regardless* of the materiality of the undisclosed fact (though the commission of a crime or fraud itself would imply that materiality is essential).³⁰ Where substantive laws require provision of information or data to a regulatory agency and impose criminal sanctions for violations,³¹ the practitioner must not only attempt to avoid complicity in a client’s criminal act predicated on the withholding of relevant information, but also must consider when disclosure of confidential information under TDRPC 3.03 is required. This section focuses on the interpretation of TDRPC 3.03 in the contexts of administrative practices and litigation.

²⁹ TEX. DISCIPLINARY R. PROF’L CONDUCT 4.01. Materiality of the undisclosed fact is not directly relevant under TDRPC 4.01. Materiality may be required, however, as an element of the criminal offense which counsel is alleged to be assisting.

³⁰ TEX. DISCIPLINARY R. PROF’L CONDUCT 3.03(a)(2).

³¹ A wide range of federal and state statutes may apply. *See, e.g.*, 42 U.S.C. § 6928(d)(3) (knowing omission of material information from or false statement in document required to be maintained or submitted under RCRA); 18 U.S.C. § 1001 (knowing falsification or concealment of material fact in any matter within the jurisdiction of any department or agency of the United States); TEX. WATER CODE ANN. § 7.155 (West 2000) (failing to report spills or discharge on discovery); TEX. WATER CODE ANN. § 7.162(a)(3) (West 2000) (intentional or knowing false representation in or omission of material information from document required to be maintained under the Texas Solid Waste Disposal Act); TEX. WATER CODE ANN. § 7.162(a)(8) (West 2000) (failing to notify or report to TCEQ under Texas Solid Waste Disposal Act); TEX. WATER CODE ANN. § 7.180 (West 2000) (intentional or knowing failure to notify or report under the Texas Clean Air Act); *See also* Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY’S L.J. 821 (1990).

The environmental practitioner representing a client before a regulatory agency may, from time to time, be required to furnish information to the agency relating to the representation. In an administrative proceeding, an issue to consider is whether the agency is a “tribunal.” The definition of tribunal in the Preamble of the TDRPCs explicitly includes “administrative agencies when engaging in adjudicatory or licensing activities.”³² By implication, the agency performing a purely regulatory function (for example, a facility inspection or maintenance of agency files concerning regulated parties) is *not* a tribunal. The practitioner obviously must be alert to the possibility that the environmental agency overseeing a permit application, or determining liability in an enforcement proceeding, or performing similar functions, might be a “tribunal” within the meaning of the TDRPCs.

Where the criminal act of concern is a failure to report data as required by permit or rule, the agency’s function is not adjudicatory and its role is not that of a tribunal. Accordingly, the lawyer’s ethical obligations should not be governed by TDRPC 3.03. When, however, there is a possibility that the agency is a “tribunal,” TDRPC 3.03 clearly requires no disclosures by counsel unless the failure to do so would “assist” a criminal act. Whether counsel’s silence must rise to the level of “aiding and abetting” the criminal act in question is not clear from either the rule itself or the Comments to the rule, which concern themselves primarily with perjury. Where the criminal act of concern is a failure to respond completely or accurately to the agency’s request for information in the course of a permit, enforcement, or similar adjudicatory proceeding,³³ the person responsible for reporting such data will be subject to the law, but others will not; if counsel does not assume responsibility for reporting, arguably counsel is not capable of committing the crime.³⁴

Conversely, where the client “hides behind” his or her lawyer and the lawyer’s silence would amount to actionable concealment, Rule 3.03 obligates the lawyer to make curative

³² The tribunal is generally defined as the “seat of a judge.” *Black’s Law Dictionary* (West 5th ed. 1979). The Preamble to the TDRPCs, however, is much more explicit, defining a “tribunal” as:

... [A]ny governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. “Tribunal” includes such institutions as courts and *administrative agencies when engaging in adjudicatory or licensing activities* as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, *hearing officers* and comparable persons empowered to resolve or to recommend a resolution of a particular matter . . . but it does not include . . . governmental bodies when acting in a legislative or rule-making capacity.

TEX. DISCIPLINARY R. PROF’L CONDUCT Terminology [emphasis supplied]. The Comments to TDRPC 3.03 mention only courts, and not agencies, in referring to tribunals.

³³ See TEX. WATER CODE ANN. § 7.149 (West 2000).

³⁴ TDRPC 3.03 and the comments to the rule do not, however, negate the possibility that disclosure obligations may be triggered by the potential for “conspiracy” or “aiding and abetting” liability arising from counsel’s representation of his or her client.

disclosures if unable to persuade the client to do so. The ultimate difficulty is in assessing when silence will be construed to be fraud, a question for which there is no all-purpose answer. If, however, the lawyer has not taken the unusual step of assuming reporting or disclosure duties on behalf of a client, interceding between client and agency, the agency cannot reasonably claim reliance on the lawyer's silence.

C. The Threat of Civil Sanctions by Agencies

Public agencies other than the EPA have aggressively claimed reliance, however, on lawyers' failure to disclose regulatorily sensitive information.³⁵ To address some of the ethical issues presented by the claim that duties of disclosure may be owed to public agencies *by counsel*, the ABA Standing Committee on Ethics and Professional Responsibility has issued a Formal Opinion.³⁶ Opinion 93-375 expressly directs itself to omissions and false statements in the context of the banking examination.³⁷ The opinion initially concludes that the bank regulatory agency should not be regarded as a "tribunal" within the meaning of Model Rule 3.3.³⁸

Similarly, the opinion concludes that a routine bank examination should not be treated as an "adjudicative proceeding" under Model Rule 3.3, and thus should not bring into play the duty of candor imposed by that rule.³⁹ The opinion states that because of the overriding importance of protecting client confidences, the applicable rules should be interpreted to protect confidences, "even if the result is to allow the client to engage in fraud."⁴⁰

With respect to the more subtle aspects of the problem, where no affirmative misstatement of fact by client or counsel is involved, the opinion suggests that counsel's omission to state a material fact concerning the subject matter of the examination could "be

³⁵ Most prominently, the United States Office of Thrift Supervision has pursued a prominent national law firm in an administrative action for alleged reporting improprieties under federal regulations applying in the context of bank examinations. *In the Matter of Peter M. Fishbein*, OTS AP No. 92-27 (Office of Thrift Supervision, Department of Treasury, March 11, 1992). The administrative case settled with the target law firm agreeing to a \$41,000,000 payment to OTS.

³⁶ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-375 (1993).

³⁷ Opinion 93-375 presents and discusses the issues of the lawyer's duties to the client and to the examiner in the context of a banking examination, including the lawyer's obligations to his client if he believes certain disclosures by the client are legally required; the lawyer's duty to correct false statements made by his client in the lawyer's presence; the lawyer's omission of material information from a response by the lawyer to the examiner; and other related issues.

³⁸ See Section III.B. for a discussion of the relevance of this determination.

³⁹ See Section III.B. for a discussion of the duty of candor in adjudicative proceedings under the TDRPCs and the Model Rules.

⁴⁰ See Op. 93-375, *supra* note 36 at 4.

tantamount to an affirmative false statement” if the context is such that counsel knows that the omission “is likely to mislead” the examiners.⁴¹ The opinion is clear that such conclusion does not rest on an abstract characterization of the lawyer’s role in representing the client (as agent, for instance).

Opinion 93-375 does not firmly establish a precedent on which environmental agencies might rely in making a claim for breach of ethics against counsel to members of the regulated community. First, it is difficult to draw a parallel between a bank examination by banking authorities and the commonplace inspection by an environmental agency. The examination, it may be argued, is essential to the banking authority’s guarantee of an institution’s deposits for the public’s benefit; the environmental agency regulates by permit and enforcement action, but does not so directly “underwrite” legal compliance of members of its regulated community. This distinction argues against a literal application of the guidelines in Opinion 93-375 to the commonplace agency inspection, or even to the more formal context of the permit application.

Information gathering by the environmental agency in the permitting process is perhaps somewhat more akin to the bank examination. While it is conceivable that counsel to the permit applicant might assume an inappropriately high degree of control over communications with an agency, a key distinction is the fact that the process of bank examination is not exposed to the public (raising the importance of full voluntary disclosure by the regulated institution); the permitting process in contested cases is apt to involve protestants and an adversarial component.

There is undoubtedly some policy justification for discipline of lawyers whom the client succeeds in “hiding behind,” *assuming* it can be established that the lawyer’s actions or omissions amounted to misrepresentations of fact as suggested in Opinion 93-375. If the private practitioner’s dealings with an environmental agency are so motivated, then it is reasonable to expect that the agency might very well attempt a direct action against the practitioner. Such actions would, of necessity, be based on violations by the attorney of substantive laws or rules administered by the agency and *not* on allegations of ethical misconduct.

D. The Threat of Civil Sanctions by the Court

Ground-breaking law establishing the parameters of the litigator’s duty to disclose problematic privileged information has been made in the environmental case law.⁴² The *Shaffer* litigation dealt with a U.S. Attorney’s duty to inform a trial court of the perjury of a material witness through falsification of academic credentials -- a fitting ethical subject for a practice area demanding frequent support from technical experts.

⁴¹ *Id.* at 6.

⁴² *U.S. v. Shaffer Equip. Co.*, 796 F. Supp. 938 (S.D. W.Va. 1992); *aff’d in part, rev’d in part, vacated and remanded*, 11 F.3d 450 (4th Cir. 1993).

The *Shaffer* case was a CERCLA cost recovery action brought in 1990 by the Department of Justice. The action related to a polychlorinated biphenyl (PCB) removal action in West Virginia overseen by Robert E. Caron, the EPA's On-Scene Coordinator. In addition to directing on-site activity by the EPA's contractors, Mr. Caron participated substantially in the formation of the administrative record leading up to the institution of litigation by the U.S. against various potentially responsible parties ("PRPs"). Government counsel planned for him to be a material fact witness for the U.S. It appears that Mr. Caron had misrepresented his credentials in applying for his position at the EPA; instead of the undergraduate degree from Rutgers in environmental sciences and master's degree from Drexel in organic chemistry which his application to EPA disclosed, the evidence in the case established that he attended college without graduating and had never enrolled in graduate school.

Notwithstanding the fact that attorneys involved in the *Shaffer* litigation at both the EPA and Department of Justice were aware of Mr. Caron's misrepresentations, and certain of those same lawyers were also aware of a pending criminal investigation of Mr. Caron's alleged perjury, neither the court nor counsel for the defendants in the action were so advised. After Justice elected to file a motion for summary judgment including affidavits by Caron and involving an administrative record in which Caron participated substantially, the defendants moved for dismissal of the case with prejudice and sanctions against several participating assistant U.S. Attorneys, based on violation of the duty of candor as set forth in the local version of Model Rule 3.3.

The trial court granted both motions, holding that lead counsel for the U.S., his supervisors, and counsel at EPA involved in preparing the case for trial had all violated the duty of candor. The court seems to have been particularly moved by lead counsel's failure, for a period in excess of four months, to inform the court of a pending criminal investigation being carried out by the Office of the Inspector General regarding Caron's testimony in a 1988 criminal case (unrelated to the case at bar). The court also was affronted that the government's lawyers had elected to file a motion for summary judgment predicated on Mr. Caron's affidavit, without allusion to the substantial questions about his credibility raised by Justice's own client agency.

On appeal, the Fourth Circuit found that the evidence supported an award of sanctions and emphatically endorsed the trial court's exercise of its inherent powers, but vacated the dismissal.⁴³ The case was remanded for the imposition of sanctions short of dismissal. The Fourth Circuit's decision seems to have been premised on the overriding concern that trial courts must exercise inherent powers with great restraint due to the absence of statutory or other articulated limits.⁴⁴

⁴³ *U.S. v. Shaffer Equip. Co.*, 11 F.3d 450, 463 (4th Cir. 1993).

⁴⁴ *Id.* at 461-2.

Whether the duty of candor of government representatives is higher than that of private practitioners is not clear. Neither TDRPC 3.03 nor the opinions in *Shaffer* mention that factor. The trial court's opinion suggests, however, that if the situation were reversed, the defendants' counsel would have been sanctioned with equal force.

Whether the practitioner practices in the public or private sector, the tension between the duty of candor and duties to the client must be carefully weighed at every turn. The courts may be slow to reach beyond the rules regulating the interrelationships of lawyers with clients and adversaries to the duty of candor and the exercise of inherent powers. But as is evident from the reaction of the court in *Shaffer*, once the rule is invoked, lawyers (and their clients) may be at substantial risk where the boundaries established by the duty of candor have not been adequately observed.

E. The Threat of Criminal Sanctions

Beyond the threat of professional disciplinary action or civil liability for inappropriate concealment lies a more serious possibility: the characterization of a lawyer's refusal to breach confidentiality as criminal concealment. There exists a difficult tension between the obligations of confidentiality imposed by the TDRPCs and Texas' reporting and disclosure laws, some of which carry criminal sanctions. The principal statutes in Texas defining criminal conduct in the context of environmental reporting and disclosure fail to define with much precision the parties who are potentially culpable under the law.⁴⁵ One exception is § 7.155 of the Water Code, which makes only persons operating, in charge of, or responsible for a facility or vessel that causes a discharge criminally liable for failure to report such a discovery.⁴⁶ Under other law, the ambitious prosecutor may argue that any party who controls the preparation of a submission to a regulatory agency may be subjected to liability for a faulty or incomplete submission, at least to the extent of control by such person. While the practitioner is agent and not principal, the lawyer can exert substantial influence in preparing communications and presentations on his or her client's behalf.

⁴⁵ See, e.g. TEX. WATER CODE ANN. § 7.162(a)(3) (West 2000), providing in relevant part:

A person commits an offense if the person, acting intentionally or knowingly with respect to the person's conduct: omits or causes to be omitted material information, makes or causes to be made a false material statement or representation in any application, label, manifest, record, report, permit, plan, or other document, filed, maintained, or used to comply with any requirement of Chapter 361, Health and Safety Code, applicable to hazardous waste.

See *supra* note 31, for citations to other potentially relevant statutes criminalizing reporting violations.

⁴⁶ TEX. WATER CODE ANN. § 7.155 (West 2000).

On the other hand, counsel cannot easily be accused of endangerment offenses⁴⁷ under normal circumstances. The law expressly negates the attribution of culpable intention or knowledge to the accused.⁴⁸ The client's state of mind may not be attributed to the lawyer, even assuming the highly unusual circumstance that the lawyer could be proven to have committed the remaining elements of a statutory endangerment offense.

IV. MANAGING DISCLOSURES

Getting back to the ethical dilemma presented by Mr. Taback, an attorney may remind an environmental consultant of confidentiality obligations and refrain from providing much information to the consultant about when or whether a release of toxic chemicals will be reported for a number of reasons, many of which are neither sinister nor wrongful. A lawyer's professional responsibilities contemplate zealously pursuing a client's best interests within the bounds of the law.⁴⁹ This may involve managing disclosures of information adverse to a client in such a way as to minimize any damage to the client or its reputation. Although a lawyer, bound by ethical obligations to the client, may not be at liberty to discuss the lawyer's advice concerning applicable laws or any other client confidences with the consultant, the lawyer will likely be charged with the responsibility to take appropriate steps intended to manage and control the disclosure of damaging information, including the prevention of an environmental consultant's preemptive disclosure. Disclosures can be made while exploiting the full benefit of laws specifically designed to encourage disclosures and compliance, while minimizing the client's liability. For example, if the environmental compliance audit in Mr. Taback's example were done in accordance with the Texas Environmental, Health, and Safety Audit Privilege Act, the client could be entitled to claim immunity from administrative or civil penalties related to the release of toxic chemicals if the disclosure were made properly to the appropriate authority and the appropriate steps were taken to correct the violation.⁵⁰ To the contrary, a preemptive disclosure by an environmental consultant to the regulatory authorities could potentially subject the client to substantial penalties and adversely affect the client's relationship with the regulatory authorities and perception by the public. In addition, a client will likely have a considerable interest in managing such a disclosure to the public through the media, with hopes of putting its actions taken in response to a potentially damaging discovery in the best light.

⁴⁷ Endangerment offenses are defined as the discharge or allowance of the discharge of a waste or pollutant, resulting in human endangerment. *See, e.g.*, TEX. WATER CODE ANN. §§ 7.152, 7.153, 7.154, and 7.163 (West 2000).

⁴⁸ *Id.*

⁴⁹ TEX. DISCIPLINARY R. PROF'L CONDUCT Preamble.

⁵⁰ TEX. REV. CIV. STAT. ANN. art. 4447cc (West Supp. 2002).

V. CONCLUSION

To maintain the proper functioning of the legal system and encourage free discussion between a lawyer and a client, a lawyer's primary obligation must be to retain confidential information of his or her client. Only a few situations give a lawyer the discretion, and fewer still the obligation, to make disclosures adverse to a client's interest. As illustrated by the discussion above, many factors must be considered in weighing a lawyer's fiduciary obligations against preventing criminal or fraudulent acts and protecting public health and safety.